# Wah Chan Consolidated Sdn Bhd v Sasidaran a/l Damoo Kunjiraman

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO (MT–1) 12–127 OF 2002
SYED AHMAD HELMY JC
24 SEPTEMBER 2004

*Landlord and Tenant — Rent — Arrears — Sub-tenancy — Assignment without approval of landlord — Whether sub-tenancy tainted by illegality absolving sub-tenant from paying arrears of rent — Whether payment of rental must be ascertained from sub-tenancy agreement only and not from other agreements between the parties*

*Landlord and Tenant — Determination — Double rent — Sub-tenancy — Holding over and option to renew not exercised — Whether sub-tenant absolved from paying rent due to misrepresentation and apparent illegality*

*Landlord and Tenant — Tenant's covenant — Assignment — Breach — Assignment without approval of landlord — Effect of breach — Chief tenant assigned premises to sub-tenant contrary to principal tenancy agreement — Whether assignment of lease in breach of covenant not to assign without consent invalidates assignment — Whether sub-tenant absolved from paying rental due to breach of no assignment term*

The plaintiff, the chief tenant of a retail-unit located in a shopping centre ('the premises') applied summarily against the defendant, its sub-tenant for vacant possession, unpaid arrears and double-rental for holding over the premises after the expiry of the sub-tenancy on May 2002 to 18 April 2003. The fact of failure to pay rental and holding over was not denied. The plaintiff's principal tenancy agreement only allowed assignment of the premises with prior written consent of the landlord. The defendant alleged that the plaintiff had misrepresented to the landlord that the defendant was the plaintiff's 50% owned associate company — thus causing the landlord to terminate the plaintiff's tenancy over the premises — and that the parties have entered into a franchise agreement in relation to the operation of a jewellery outlet at the premises. Therefore, the defendant submitted the sub-tenancy agreement was tainted with illegality, which absolved the defendant from paying rental. Hence, according to the defendant, these were triable issues to be ventilated through the medium of a full trial. The plaintiff's application for summary judgment was dismissed with costs. The plaintiff appealed.

**Held**, allowing the plaintiff's appeal with costs:

(1) The sub-tenancy was an entirely distinct agreement from the franchise agreement, and the determination of the issue of liability for payment of rental had to be ascertained from the four corners of the sub-tenancy agreement. The sub-tenancy agreement was the written agreement governing the relationship of the parties herein (see paras 13 and 14).

(2) The issue of illegality of the sub-tenancy agreement arising from the misrepresentation was a question of law. An assignment of the lease in breach of the covenant not to assign without the consent of the lessor does not invalidate the assignment. Also, breach of covenant not to assign without the consent of the lessor even if by reason of misrepresentation does not affect the validity of the assignment. Therefore, the misrepresentation even though exposing the principal tenancy to forfeiture did not affect the validity of the sub-tenancy with the defendant and hence the liability to pay the rental due (see paras 15–17).

(3) On double rental, it was clear that upon the expiry of the sub-tenancy and the option to renew was not exercised, the sub-tenancy expired on 30 April 2002 but the defendant had remained in possession. Under s 28(4)(a) of the Civil Law Act 1956 double rental was statutorily provided for during the period of holding over (see paras 18 and 19).

[**Bahasa Malaysia summary**

Plaintif, penyewa utama satu unit runcit yang terletak di pusat membeli-belah ('premis tersebut') telah membuat permohonan secara terus terhadap defendan, penyewa kecil untuk milikan kosong, tunggakan yang tidak berbayar dan sewa berganda kerana masih menduduki premis tersebut selepas tamatnya penyewaan kecil pada Mei 2002 sehingga 18 April 2003. Fakta mengenai kegagalan untuk membayar sewa dan pemegangan lepas tidak dinafikan. Perjanjian sewa utama plaintif hanya membenarkan penyerahan hak premis tersebut selepas kebenaran bertulis daripada tuan punya tanah. Defendan menuduh bahawa plaintif telah membuat representasi yang salah kepada tuan punya tanah bahawa defendan merupakan pemegang 50% kepada syarikat bersama plaintif — yang menyebabkan tuan punya tanah menamatkan sewa plaintif ke atas premis tersebut — dan bahawa setiap pihak telah memasuki perjanjian francais berkenaan dengan operasi kedai barangan kemas di premis tersebut. Oleh itu, defendan telah menyerahkan perjanjian sewa kecil yang disaluti oleh kepenyalahan undang-undang, yang membebaskan defendan daripada membayar sewa. Maka dengan itu, menurut defendan, perkara ini adalah isu-isu yang boleh dibicarakan yang sepatutnya diselesaikan melalui perbicaraan penuh. Permohonan plaintif untuk penghakiman terus telah ditolak dengan kos. Plaintif telah merayu.

**Diputuskan**, membenarkan rayuan plaintif dengan kos:

(1) Sewa kecil merupakan satu perjanjian yang berbeza pada keseluruhannya daripada perjanjian francais dan penentuan liabiliti untuk pembayaran sewa mestilah ditentukan daripada keseluruhan perjanjian sewa kecil. Perjanjian sewa kecil adalah perjanjian bertulis yang mengawal perhubungan di antara pihak-pihak di sini (lihat perenggan 13 dan 14).

(2) Isu berkenaan dengan kepenyalahan undang-undang perjanjian sewa kecil yang berbangkit dari misrepresentasi adalah persoalan undang-undang. Suatu penyerahan hak pajakan yang menyalahi waad untuk tidak menyerah hak tanpa kebenaran pemberi pajak tidak menjadikan penyerahan hak sebagai tidak sah. Juga, perlanggaran waad untuk tidak menyerah hak tanpa kebenaran pemberi pajak walaupun dengan alasan misrepresentasi tidak memberi kesan ke atas kesahihan penyerahan hak. Oleh itu, misrepresentasi walaupun tidak mendedahkan sewa utama kepada perlucuthakan tidak memberi kesan ke atas kesahihan sewa kecil bersama defendan dan seterusnya liabiliti untuk membayar sewa adalah tertunggak (lihat perenggan 15–17).

(3) Berkenaan sewa berganda, adalah jelas selepas tamatnya tempoh sewa kecil dan peluang untuk memperbaharui tidak digunakan, sewa kecil telah tamat pada 30 April 2002 tetapi defendan masih lagi memegang milikan. Di bawah s 28(4)(a) Akta Undang-Undang Sivil 1956 sewa berganda disediakan secara statutori semasa tempoh pemegangan lepas (lihat perenggan 18 dan 19).

**Notes**

For cases on assignment and subletting, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 7–10 and 1397–1420

For cases on double rent, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 863–864 and 1345

For cases on breach of assignment, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1405–1407

**Cases referred to**

*Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd* [1997] 3 MLJ 531 (refd)
*Mount Elizabeth Health Centre Pte v Mount Elizabeth Hospital* [1993] 1 SLR 1021 (refd)
*Old Grovebury Manor Farm Ltd v W Seymont Plant Sales & Hire Ltd & Anor (No 2)* [1979] 3 All ER 504 (refd)
*Sanctuary Housing Association v Baker & Anor* [1997] EWCA Civ 2333 (refd)

**Legislation referred to**

Civil Law Act 1956 s 28(4)(a)

**Appeal from**: Summons No 52–2957 of 2002(5) (Sessions Court, Johor Bahru)

*Gobind Singh Deo (Zamri Idrus with him) (Karpal Singh & Co) for the respondent.*
*George Neo (Yeo, Tan, Hoon & Tee) for appellant.*

**Syed Ahmad Helmy JC**:

**[1]** The appellant/plaintiff appeals against the decision of the sessions court judge delivered on 16 August 2002 wherein the appellant/plaintiff's application for summary judgment was dismissed with costs.

**[2]** The appellant/plaintiff's action is for:

(a) vacant possession;

(b) unpaid arrears of rental for the six month period from December 2001 to May 2002 amounting to RM24,540; and

(c) double-rental for holding over from May 2002 to 18 April 2003 of a retail-unit located in a shopping-centre, namely Unit J1–18, Level 1, Johor Bahru City Square ('the premises').

**[3]** It is not in dispute that the plaintiff is the chief tenant of the premises pursuant to a tenancy agreement dated 28 September 1999 entered into with the landlord Johdaya Karya Sdn Bhd ('the principal agreement'). It is also not in dispute that the parties herein had entered into a sub-tenancy agreement dated 24 February 2000 wherein the appellant/plaintiff (as chief tenant) had granted a sub-tenancy to the respondent/defendant for the said premises, for a period of two years commencing from 1 March 2000 to 30 April 2002 at an agreed monthly rental of RM4,417.20 and RM490.80 as monthly service charge.

**[4]** It is not denied by the respondent/defendant that since December 2001, no rental whatsoever has been paid and upon expiry of the said sub-tenancy on 1 May 2002, the respondent/defendant had failed to deliver vacant possession of the said premises and has continued in occupation thereof without paying any rental.

**[5]** There is a clause in the principal agreement allowing assignment only with the prior written consent of the landlord.

**[6]** There is a clause in the sub-tenancy agreement giving the respondent/defendant an option to renew for a further period of three years, at a rental to be mutually agreed upon. It is not denied that the respondent/defendant has not exercised this option to renew.

**[7]** In view of the respondent/defendant's breaches of the said sub-tenancy agreement by:

(a) not paying any rental for the months December 2001 till April 2002;

(b) not surrendering vacant possession of the demised premises upon expiry of the said sub-tenancy; and

(c) holding over the said demised premises.

**[8]** A notice of demand for rentals due was issued on 2 April 2002 and a notice of forfeiture was then subsequently issued on 27 June 2002 and the respondent/defendant continued in occupation of the premises until 18 April 2003 when they delivered vacant possession.

**[9]** The landlord had pursuant to letter dated 11 March 2003 terminated the principal tenancy agreement on the ground that the plaintiff had in letter dated 27 July 2002 misrepresented that the defendant was the plaintiff's 50% owned associate company. Since the plaintiff had issued distress proceedings against defendant claiming unpaid rentals, they took the position that there has been a breach of the clause against assignment aforesaid.

**[10]** The respondent/defendant's case is as follows:

(a) that due to the fact that the parties hereto have entered into a franchise agreement dated 24 February 2000, in relation to the operation of a 'Wah Chan' Jewellery outlet at the demised premises for a period of five years; and

(b) based upon a letter from the appellant/plaintiff to the respondent dated 24 April 2000.

**[11]** The respondent/defendant contends that the misrepresentation by the plaintiff that it is the 50% associate owner of defendant has tainted the principal agreement with illegality and hence the sub-tenancy agreement is also consequently tainted which absolves the defendant from paying rental.

**[12]** By reason thereof the defendant submits that there are triable issues which merits the issues to be ventilated through the medium of a full trial.

**[13]** Having perused the documentary evidence herein and in particular to the sub-tenancy agreement and the franchise agreement I am of the considered view that the sub-tenancy is an entirely distinct agreement from the franchise agreement, and the determination of the issue of liability for payment of rental has to be ascertained from the four corners of the sub-tenancy agreement. The sub-tenancy agreement is the written agreement governing the relationship of the parties herein.

**[14]** The franchise agreement gives the right to the respondent/defendant to utilize the business name and business know-how of the appellant and operate the business at the premises and more importantly imposes an obligation on the respondent/defendant to pay the rent of the premises which liability is found in the sub-tenancy agreement.

**[15]** Turning to the issue of illegality of the sub-tenancy agreement arising from the misrepresentation is to my mind a question of law. It is trite law that an assignment of the lease in breach of the covenant not to assign without the consent of the lessor does not invalidate the assignment: See *Old Grovebury Manor Farm Ltd v W Seymont Plant Sales & Hire Ltd & Anor (No 2)* [1979] 3 All ER 504.

**[16]** It is also trite law that breach of covenant not to assign without the consent of the lessor even if by reason of misrepresentation does not affect the validity of the assignment: *Sanctuary Housing Association v Baker & Anor* [1997] EWCA Civ 2333.

**[17]** Applying the principles aforesaid the misrepresentation even though exposing the principal tenancy to forfeiture does not affect the validity of the sub-tenancy with the defendant and hence the liability to pay the rental due.

**[18]** On double rental, the sub-tenancy agreement is clear in that the initial term is for a period of two years with an option to renew for a further three years. It is clear that rental must be paid for the initial two years and for the period of further three years upon the option to renew being exercised. It is not disputed that the option to renew was not exercised and hence the sub-tenancy expired on 30 April 2002 but the defendant remained in possession. Under s 28(4)(a) of the Civil Law Act 1956 double rental is statutorily provided for during the period of holding over.

**[19]** In the factual matrix herein the defendant was holding over for the period 1 May 2003 — a period of 11 1/2 months and hence is entitled to double rental at the rate of RM8,834.40 per month totalling RM101,595.60 pursuant to s 28(4)(a) of the Civil Law Act 1956 (see also *Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd* [1997] 3 AMR 3077 and *Mount Elizabeth Health Centre Pte v Mount Elizabeth Hospital* [1993] 1 SLR 1021).

**[20]** By reason aforesaid I accordingly allowed the plaintiff's appeal for thearrears of rental in the sum of RM24,540 and double rental totalling RM101,595.60, interests and cost.

*Appeal allowed.*

Reported by Loo Lai Mee